SWIDLER BERLIN LLP

THE WASHINGTON HARBOUR
3000 K STREET, NW, SUITE 300
WASHINGTON, DC 20007-5116
PHONE 202.424.7500
FAX 202.424.7647

WWW.SWIDLAW.COM

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BY ELECTRONIC AND OVERNIGHT MAIL

Mary L. Cottrell, Secretary
Department of Telecommunications & Energy
Commonwealth of Massachusetts
One South Station, Second Floor
Boston, MA 02110

Re: D.T.E. 03-60, 04-73, 03-59

Dear Secretary Cottrell:

On behalf of CTC Communications Corp.; DSLnet Communications, LLC; Focal Communications Corporation of Massachusetts; Lightship Telecom, LLC; RCN-BecoCom LLC; and RCN Telecom Services of Massachusetts, Inc. (jointly, the "Competitive Carrier Coalition" or "CCC"), we urge the Department to require Verizon to tariff the network elements that it is obligated to provide under Section 271 of the Telecommunications Act of 1996. The Department's request for comment asks whether Verizon's § 271 offerings constitute "common carriage" pursuant to G.L. c. 159, §§ 12 and 19. Because Verizon is required by federal law to provide these offerings to any requesting party on just, reasonable, and not unreasonably discriminatory terms, these offerings by definition qualify as common carrier services under Massachusetts law and therefore must be tariffed. Verizon's arguments that the Department is preempted from regulating services that happen to be offered pursuant to § 271 do not withstand scrutiny and must be rejected.

I. Massachusetts Law Requires Verizon to Tariff the § 271 Arrangements that It Will Offer in Massachusetts.

In fulfilling its obligation to offer 271 arrangements under federal law, Verizon is concurrently compelled by Massachusetts law to tariff them. As a threshold matter, Verizon's obligation to provision 271 arrangements pursuant to federal law is unequivocal. The Act requires BOCs, which includes Verizon, to offer access to, among other things, local loop transmission, local transport, local switching, and call-related databases.[1] The FCC has emphasized that "BOCs have an independent obligation, under section 271(c)(2)(B), to provide access to certain network elements that are no longer subject to unbundling under section 251"

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[1] 47 U.S.C. §§ 271(c)(2)(B)(iv), (v), (vi), & (x).

and must do so in accordance with §§ 201 and 202 at "just, reasonable, and not unreasonably discriminatory basis."[2] Therefore, Verizon cannot refuse to offer access to such 271 arrangements to CLECs.

From this conclusion, it necessarily follows that Verizon cannot avoid tariffing such arrangements in Massachusetts. G.L.c 159, § 19 requires that services offered by a telecommunications carrier on a common carriage basis be tariffed. The threshold inquiry as to whether the service is offered on an common carriage basis (and therefore must be tariffed) "turns on '(1) whether the carrier holds himself out to service indifferently all potential users; and (2) whether the carrier allows customers to transmit intelligence of their own design and choosing.'"[3] The "core of this analysis [of whether a service is classified as common carriage] is not whether services are being offered directly to end-users, but whether the carrier has taken on a quasi-public character by undertaking to transmit intelligence for all applicants indiscriminately."[4] Because federal law requires Verizon to provide 271 arrangements to all applicants indiscriminately, by definition that offering is a common carrier service in Massachusetts that must be tariffed.

Courts have resoundingly rejected the argument, made here by Verizon, that a tariffing obligation can be evaded on the excuse that the service is offered through negotiated agreements. Courts have held that "a carrier cannot vitiate its common carrier status [and obligations] merely by entering into private contractual relationships with its customers."[5] Consequently, the Department should conclude that Verizon must tariff such arrangements as it does for § 251 UNEs (*i.e.*, D.T.E. Tariff 17) pursuant to Massachusetts law.

II. Verizon's Opposition to the Tariff Requirement Should be Rejected.

Verizon claims that the Act and various FCC and court decisions prohibit any state regulation of services that happen to be offered pursuant to § 271, and that state commissions are

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[2] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, ¶ 656 (2003) ("*TRO*").

[3] *See, e.g., Clarification of Wholesale Tariffing Requirements*, Memorandum to Massachusetts Telecommunications Carriers and Interested Persons, Telecommunications Division, at 6 (Aug. 12, 2003) ("*Wholesale Tariff Memorandum*") (quoting, *U.S. Telecom Ass'n v. FCC*, 295 F.3d 1326, 1329 (D.C. Cir. 2002) and finding that *NARUC I*, 525 F.2d 630, analysis is rational and consistent with Massachusetts common law).

[4] *Wholesale Tariff Memorandum*, at 7 (citing *NARUC I*, 525 F.2d at 641 and explaining that a "wholesale telecommunications carrier may [therefore] take on a quasi-public character by offering services indiscriminately to all other carriers who may make use of the carrier's services, without offering those services to all end-users, to whom the wholesale carrier's services may not be legally or practically of use.").

[5] *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994).

relegated strictly to an advisory role during the initial 271 application process.[6] Verizon's arguments are based on narrow, strained, and distorted interpretations of the Act and various FCC and court decisions that imbues them with meaning that are simply absent from the text. As demonstrated below, these fast and loose legal arguments do not hold up to scrutiny and should be rejected.

A. The Act Does Not Vest the FCC with Exclusive Authority to Establish Rates, Terms and Conditions for 271 Arrangements

Verizon incorrectly asserts that the Act vests the FCC with the exclusive authority to regulate the Verizon offerings that appear on the § 271 checklist.[7] But if Congress intended § 271 to preempt the states entirely, it would have "unambiguously and straightforwardly" granted the FCC the sole authority to establish rates, terms and conditions for 271 arrangements.[8] However, it never did. Quite to the contrary, § 271 expressly refers repeatedly to interconnection agreements approved pursuant to Section 252, which is a role reserved to the State commissions.[9] Therefore, state commissions may exercise their section 152(b) authority and regulate 271 network elements.[10]

Iowa II fully supports the CCC's formulation. In *Iowa II*, the Supreme Court upheld the scheme in which the FCC established TELRIC methodology and left implementation of that

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[6] Letter from Barbara Anne Sousa, Assistant General Counsel, Verizon, to Mary L. Cotrell, Secretary, Department of Telecommunications and Energy (dated Mar. 31, 2005) ("*Verizon 271 Tariff Opposition*").

[7] *Verizon 271 Tariff Opposition*, 2-4 & 6.

[8] *Illinois Pub. Telecomms. Assoc'n v. FCC*, 117 F.3d 555, 561 (D.C. Cir. 1997) (holding that special provisions concerning BOCs "should not be read to confer upon the FCC jurisdiction" unless such provisions are "so *unambiguous or straightforward* so as to override the command of § 152(b)."); *see also New England Public Comm. Council v. FCC*, 334 F.3d 69, 75 (D.C. Cir. 2003) (finding that section 276(b) "unambiguously and straightforwardly" grants the FCC the authority to regulate the BOCs' intrastate payphone line rates); *New York & Public Service Comm'n of New York v. FCC,* 267 F.3d 91, 102 (2nd Cir. 2001) (holding that section 251(e) grants the FCC authority to act with respect to those areas of intrastate service associated with the North American Numbering Plan (and its administration) and that this explicit grant of authority provides the requisite "unambiguous and straightforward" evidence of Congress' intent to "override the command of § 152(b) that "nothing in this chapter shall be construed to apply or to give the Commission jurisdiction over intrastate service.'") (quoting *La. Pub. Serv. Comm'n,* 476 U.S. at 377). Unlike Sections 276(b) and 251(e) of the Act, section 271 does not "unambiguously and straightforwardly" grant the FCC the sole authority to establish rates, terms and conditions for 271 arrangements. Therefore, consistent with the *New England Public Comm. Council* and *New York* decisions, state commissions may exercise their section 152(b) authority and regulate 271 arrangements because nothing in section 271 unambiguously and straightforwardly prohibits states from doing so.

[9] 47 U.S.C. § 271(c)(1)(A)-(B).

[10] 271 arrangements are not interstate services but are local exchange intrastate offerings subject to state regulation pursuant to 47 U.S.C. § 152(b). Sections 271(c)(2)(B)(iv)-(vi) specifically characterize the 271 loop, transport, and switching as "local" facilities. Because these are not interstate services, they are not within the FCC's exclusive control under § 201.

methodology to the state commissions in § 252 proceedings.[11] Similarly, the FCC has established the "just and reasonable" standard for § 271 rates and has left implementation of that standards to the states.

B. The FCC Never Held that It Has Sole Authority Over the § 271 Process.

Verizon claims incorrectly that the FCC's *InterLATA Boundary Order* established exclusive FCC jurisdiction over § 271.[12] This is a grossly erroneous interpretation of this order. The FCC actually held that it had sole authority over LATA boundaries. Nothing in this order, or any other FCC decision, preempted state commissions from regulating other aspects of § 271.

If anything, the FCC expects states to establish rates, terms, and conditions for 271 arrangements that are just, reasonable and not unreasonably discriminatory. Indeed, hypothetically speaking, if Verizon were only now filing its 271 application for Massachusetts, the FCC would expect the Department to first have established "just and reasonable" rates for the 271 checklist items that are no longer § 251 UNEs under the *TRO* and *TRRO*.[13] Thus, the Department would be acting in accordance with, and not contrary to, the FCC's interpretation of the § 271 process.

C. The Federal Court Cases Cited By Verizon Do Not Preempt the Department from Acting Pursuant to § 271.

Verizon contends, incorrectly, that *Indiana Bell Tel. Co. v. Indiana Util. Regulatory Comm'n* preempts the Department from acting pursuant to § 271.[14] *Indiana Bell* found only that a state commission could not impose conditions on a § 271 application that were in fact an

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[11] *Iowa II*, 525 U.S. at 378 (emphasis added) (noting also that "state commissions' participation in the administration of the new *federal* regime is to be guided by federal-agency regulations" and that "States will be allowed to do their own thing," however, they must "hew" the lines drawn by the FCC).

[12] *Verizon 271 Tariff Opposition*, at 2. (citing *Application for Review and Petition for Reconsideration or Clarification of Declaratory Ruling Regarding US West Petitions To Consolidate LATAs in Minnesota and Arizona*, NSD-L-97-6, Memorandum Opinion and Order, 14 FCC Rcd 14392, ¶¶17-18 (1999) ("*InterLATA Boundary Order*")).

[13] The FCC expects that state commissions will make written factual findings and reach reasoned legal conclusions concerning the BOC's compliance with the requirements of Section 271. *See* Public Notice, Updated Filing Requirements for Bell Operating Company Applications Under Section 271 of the Communications Act, 16 FCC Rcd 6923, at 6930 (Mar. 23, 2001) (emphasizing that given "our 90-day statutory deadline, this Commission looks to state commissions to resolve factual disputes wherever possible. As indicated in prior section 271 orders, this Commission will accord more weight to state commission evaluations where the state has conducted a rigorous investigation of the BOC's compliance with the statutory requirements through an open, collaborative state process that allows full participation by all interested parties, and has supported its evaluation with a detailed record.") These findings and legal conclusions guide the FCC's review of a BOC's section 271 application and assist the FCC in determining whether to grant the application. Although the FCC makes the ultimate finding of compliance, it relies heavily upon the work of state commissions.

[14] *Verizon 271 Tariff Opposition*, 2-3 (citing *Indiana Bell*, 359 F.3d 493, 497 (7th Cir. 2004)).

indirect means of regulating § 251 UNEs outside the interconnection agreement process.[15] The Court emphasized that,

> What the IURC has done is to make an end run around the Act. By issuing a freestanding order, the IURC set up baselines for interconnection agreements. The order interferes with the procedures set out in the Act, which require that agreements be negotiated between private parties and only when that fails are they subject to mediation by state agencies.[16]

Verizon cannot argue that a § 271 tariffing requirement would unlawfully interfere with the interconnection agreement process because it has simultaneously refused to include rates and terms for § 271 network elements in its interconnection agreements.[17] Verizon cannot be allowed to have it both ways.[18]

Verizon also alleges that *USTA II* limits the Department's authority to establish rates under § 271.[19] The *USTA II* court never rendered such a ruling. Rather, it merely affirmed the FCC's decisions that the TELRIC pricing standard does not apply to § 271 elements. Contrary to Verizon's assertions, the decision does not at all limit a state's authority to establish rates for 271 arrangements in accordance with the FCC's prescribed standards, and Verizon is entirely wrong in trying to bootstrap such a conclusion from it.

D. Tariffing 271 Arrangements is Necessary and Would Not Impede Commercial Agreements.

Verizon argues that state regulation and tariffing of 271 arrangements would distract from "commercial agreements."[20] The CCC understands that Verizon uses the term "commercial agreement" to mean agreements that Verizon offers without a legal obligation to do so, and thus beyond the purview of regulation. Because Verizon does have a legal obligation to

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[15] *Indiana Bell,* 359 F.3d at 497.

[16] *Indiana Bell*, 359 F.3d at 498.

[17] *See* D.T.E. 04-33, Verizon Massachusetts Initial Brief at 136-142 (filed Apr. 5, 2005)

[18] Amazingly, Verizon argues that a tariffing requirement for § 271 network elements would be preempted under the holdings of *Wisconsin Bell v. Bie* and *Verizon North v. Strand*. *Verizon 271 Tariff Opposition*, at 5. However, the critical basis for both of those decisions was that a state tariffing requirement interfered with the § 252 negotiations and arbitration process, which they found Congress had made the core implementation mechanism of the Act. In the D.T.E. 04- 33 arbitration proceeding, the CCC has demonstrated that Congress intended § 271 terms to be included in § 252 agreements. If the Department agrees, Verizon could make its case that *Bie* and *Strand* preempt a separate tariff requirement. If, however, the Department determines that § 271 terms should not be included in the § 252 agreement, then a state tariff requirement could not be preempted by *Bie* or *Strand* or any other federal law because the § 252 process is the only federal requirement with which a state tariffing requirement could possibly conflict. Contrary to Verizon's insinuation, nothing in the Act establishes a federal policy to implement § 271 obligations in some sort of non-§252 "commercial agreement."

[19] *Verizon 271 Tariff Opposition*, at 3-4.

[20] *Verizon 271 Tariff Opposition*, at 4-6.

provide 271 arrangements, these facilities would not be provided under unregulated "commercial agreements." Verizon's argument is specious as a legal matter, just as it would be irrelevant if Verizon argued that the Department's involvement in interconnection agreement process interfered with its ability to enter "commercial agreements" related to its § 251 UNE obligations.

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For the foregoing reasons, the Department should reject Verizon's arguments and order Verizon to tariff its 271 arrangements as Massachusetts law requires.

Nine (9) additional copies of this filing are attached. Also attached is an extra copy of this filing, please date-stamp it and return it in the attached, postage prepaid envelope provided. Please note that CCC will submit this filing in electronic format by E-mail attachment to dte.efiling@state.mass.us.

Should you have any questions concerning this filing, please do not hesitate to contact us.

Sincerely,

Russell M. Blau
Paul B. Hudson
Philip J. Macres

Counsel for CTC Communications Corp.; DSLnet Communications, LLC; Focal Communications Corporation of Massachusetts; Lightship Telecom, LLC, RCN-BecoCom LLC; and RCN Telecom Services of Massachusetts, Inc.

cc: Jesse Reyes, Hearing Officer
D.T.E. 03-60 Service List
D.T.E. 03-59, 04-73 Service List (e-mail only)